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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 816

CHARLES BERSTEIN, a/k/a CHUCK BERNS,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the
State of Missouri.

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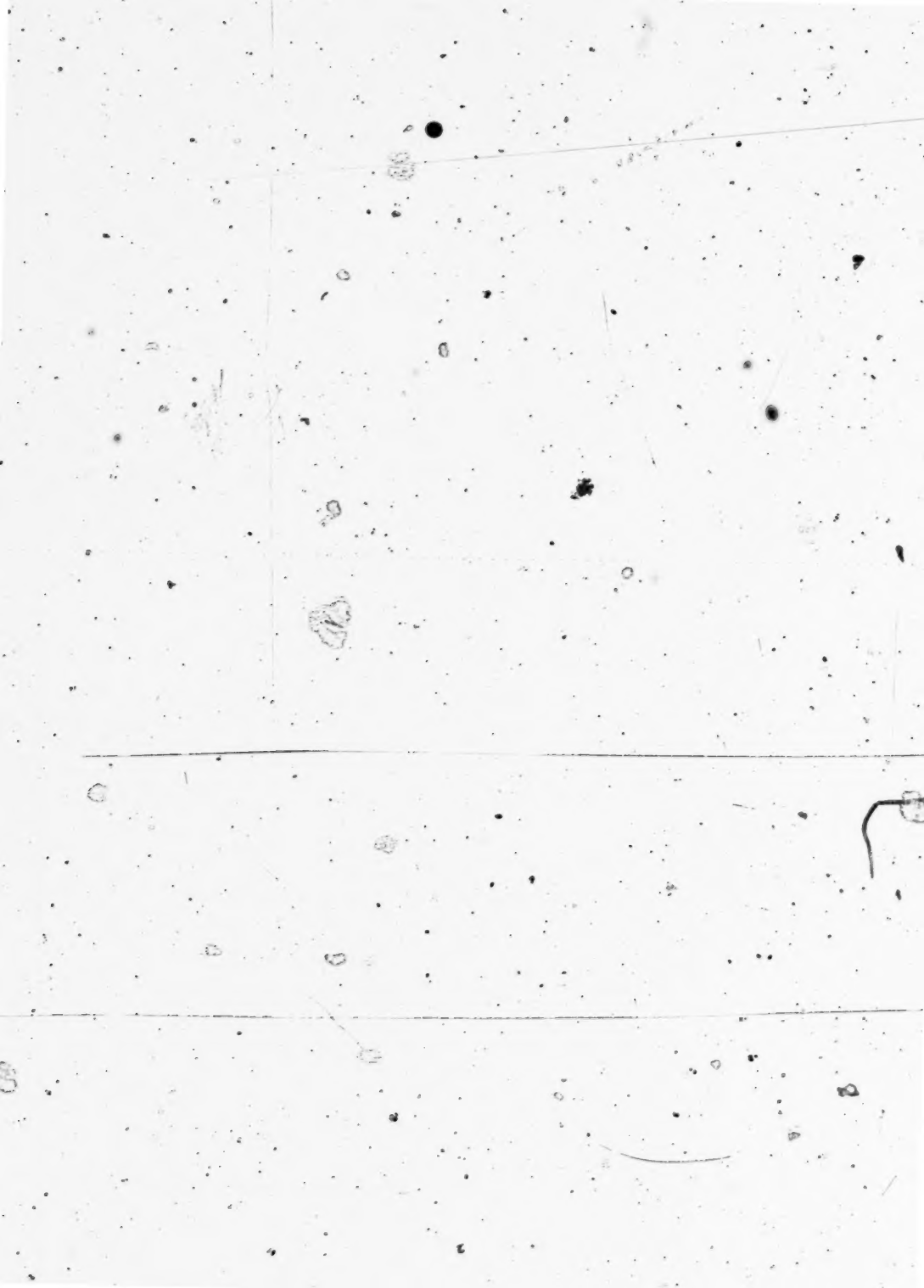

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STATE OF MISSOURI,
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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Missouri made final in the above-styled cause on November 11, 1963, which is the date of the denial of Petitioner's Motion for Rehearing or Transfer to the Court En Banc as to Appellant's Motion to Suppress, after decision of Division No. 2 of the Supreme Court of Missouri entered October 14, 1963.

OPINION BELOW.

The opinion of the Supreme Court of Missouri is reported at 372 S. W. 2d 57. The opinion and judgment of the Missouri Court is attached hereto.

JURISDICTION.

The judgment of the Supreme Court of Missouri attached hereto was entered October 14, 1963, and a Motion for Rehearing or in the Alternative for Transfer to the Court en Banc as to Appellant's Motion to Suppress (required under Missouri law) was denied November 11, 1963, thereby rejecting Petitioner's contentions based on the Fourth and Fourteenth Amendments to the Constitution of the United States which contentions were initially raised prior to trial by a Motion to Suppress. This Court's jurisdiction is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether a police officer is acting upon probable cause in making an arrest and incidental search when he is relying upon information received in an anonymous phone call and the officer is totally unaware of the identity or reliability of the caller?

2. Whether a police officer may make an arrest and incidental search without a warrant when he waits twenty-four (24) hours after receiving the information relied upon as probable cause before making the arrest?

3. Whether a police officer may in a search incidental to an arrest seize private papers of the Petitioner for use as evidence when such papers do not in any way constitute elements or fruits of the crime or any criminal activity?

CONSTITUTIONAL PROVISIONS.

1. The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, . . ."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No state shall . . . deprive any person of life, liberty or property without due process of law . . ."

STATEMENT.

Petitioner was convicted of the offense of buying and receiving stolen property under Section 560.270, Mo. Revised Statutes Annotated 1959, and was sentenced to a term of imprisonment of four (4) years. On appeal to the Supreme Court of the State of Missouri the cause was reversed and remanded for a new trial on a point not connected with this petition for Writ of Certiorari.

Prior to trial petitioner filed a motion to suppress items seized from the petitioner at the time of his arrest on March 30, 1961 (T. 7-8).[1] At the hearing on the motion police officers of the City of St. Louis testified that they received an anonymous phone call that one Gilberti was placing some stolen paintings into his automobile at the petitioner's place of business (S. 24). The officers went to the petitioners automobile lot and upon arrival saw

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[1] "T." references are to the Transcript on Appeal and "S." references are to the Supplement to the Transcript on Appeal.

the petitioner standing on the sidewalk talking to Gilberti, and thereafter Gilberti got into his automobile and drove away (S. 24-25). The police officers followed Gilberti and placed him under arrest and upon searching his automobile discovered two stolen paintings in the trunk (S. 25). This all occurred on March 29, 1961.. When Gilberti was seen talking to the petitioner the petitioner had just come out of a restaurant (S. 24).

When questioned about the paintings, Gilberti indicated that he had purchased them from a colored man the previous night (S. 25). Prior to finding the paintings in the trunk of Gilberti's automobile, the officers had not seen them (S. 27). In questioning Mr. Gilberti, the name of the petitioner was not mentioned and in questioning Mrs. Langenbein, the owner of the paintings, the name of the petitioner was not mentioned (S. 27-28).

The following day the police officers went out to the used car lot and found several other employees on the lot and the petitioner and another man in the office and arrested the petitioner (S. 12). They also searched his place of business and took an adding machine and check protector which was subsequently returned to the petitioner, because the police could not find from where they had come (S. 16-17).

At the time of the petitioner's arrest the police had no warrant for his arrest, and he was not violating any law that they observed. He was placed under arrest for investigation, suspected of buying and receiving stolen property (S. 12-13). The officers stated that the petitioner was arrested for investigation, suspected of buying and receiving stolen property and in response to the question, "What stolen property specifically were you referring to?", the officer answered "Nothing specific". And in response to the question, "Nothing specific: in other

words, there was a general investigation?", he answered "Yes" (S. 15-16).

After the petitioners arrest he was taken to the police station where he was booked and his property taken from him and placed in a property envelope (S. 16; T. 173). Thereafter his billfold was removed from the envelope without petitioner's knowledge and certain papers were removed from the billfold which the police had photocopied, and the papers were then returned to the billfold and the billfold returned to the property envelope which was returned to the petitioner upon his release (S. 22; T. 174-175). Subsequent to the petitioner's arrest the police did not apply for any warrant (information) against the petitioner (S. 15). Some months later the petitioner was indicted and at the trial the photocopy of the petitioner's papers was introduced, over objection, into evidence as Exhibit 3 (T. 167-171).

Exhibit 3 was a photocopy of a business card in petitioner's billfold containing certain numerical notations which the State contended was a record of moneys paid to one Robert Barnes, the thief who allegedly sold the stolen merchandise to the petitioner.

The Supreme Court of the State of Missouri held that the officers had not acted arbitrarily and had proceeded upon probable cause in the arrest and subsequent search of the petitioner and that, therefore, the trial court was proper in denying petitioner's motion to suppress evidence.

REASONS FOR GRANTING THE WRIT.

A. The instant case raises the issue of an officer making an arrest upon information by an unknown and undisclosed informant in violation of prior decisions by this Court.

There is no question about the right of an officer to make an arrest without a warrant based on probable cause, **Carroll v. United States**, 267 U. S. 132. The question presented in the instant situation, however, is the existence of probable cause when the officer has information from an anonymous phone call which in no way implicates or concerns the petitioner.

When a police officer is acting upon information received from an informant as probable cause this Court has held that the information must be known to the officer to be trustworthy before the officer is justified in acting upon it, **Draper v. United States**, 358 U. S. 307. The test of trustworthiness is impossible to achieve in the instant case in view of the fact that the officer had no way of knowing the source of the information since it was received in an anonymous phone call.

This Court has held in **Roviaro v. United States**, 353 U. S. 53, that the identity of a confidential informant must be disclosed if the disclosure is essential to a fair determination of the cause; the Court pointing out that when an informant is relied upon to establish probable cause, the Government must disclose his identity. In the instant situation the police officer could not, if he had chosen to, disclose the identity of the informant in view of the fact that the officer had no knowledge of his identity (S. 26). The situation thus resulting then is one where neither the court nor the police officer could determine the reliability

of the informant or the trustworthiness of the information that he had given them.

When it is considered that the information received in the anonymous phone call could not be tested as to reliability and when it is further considered that the information in no way implicated the petitioner in any illegal activity, it certainly becomes apparent that this information could in no way constitute probable cause to justify an officer in making an arrest and incidental search without a warrant.

B. **The ruling by the state courts destroys the necessity of obtaining a search warrant or an arrest warrant even where there is sufficient time to obtain such warrants.**

If in fact the officers in the instant case had probable cause to arrest the petitioner, their delay in acting upon said probable cause eliminated their right to proceed without a warrant. The information obtained by the officers was obtained on March 29th, however, nothing was done by any officers with respect to arresting the petitioner for a twenty-four (24) hour period and his arrest was affected on March 30th (S. 24).

The purpose in allowing an officer to act upon probable cause is to avoid in certain instances the delay necessitated by an application for a warrant, **Johnson v. United States**, 333 U. S. 10. The officers in the instant case by waiting twenty-four hours certainly had ample time to apply for a warrant and proceed in that manner.

The obvious reason for the officers proceeding as they did was that they did not have sufficient information upon which to make an affidavit and seek a warrant to arrest or search petitioner. The officers' own testimony herein reveals that the arrest of the petitioner was for nothing specific, but merely based upon a general investigation (S.

15-16). The arrest of the petitioner was in no way connected with the offense for which he was subsequently charged even though the officers knew of the offense prior to the time of the arrest.

C. **The ruling of the state courts permits an indiscriminate seizure from a person including the seizure of items possessed only of an evidentiary value.**

If arguendo the ar[illegible]n in this case was lawful, a question still remains as to the subsequent search and seizure. As the evidence shows, that which was obtained from the petitioner amounted to papers removed from his billfold (S. 22-23). These papers were not the instruments or the fruits of crime, but merely constituted evidence which was introduced in the trial as Exhibit 3 (T. 130, 194). It has been specifically held that evidence, and only evidence, is not subject to seizure even if the search is lawful; the right of search and seizure is limited to seizure of instrumentalities or the fruits of a crime and seizure cannot be used merely to obtain evidence to be used against the defendant. It was stated in **Abel v. United States**, 362 U. S. 217, 234: "We have held in this regard that not every item may be seized which is properly inspected by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them." See also **Gouled v. United States**, 255 U. S. 298, 310; **Lopez v. United States**, 373 U. S. 427.

The items seized from the petitioner in the instant case certainly do not fall within the classification of instrumentalities or fruits of crime, but were merely papers removed from petitioner's billfold containing notations that he allegedly made when money was paid to the witness Barnes, and certain telephone numbers which

he carried in his billfold. The papers were not retained by the police but were merely photocopied and then secretly redelivered to the petitioner without informing him that they had in fact been so copied. Certainly if the items were instrumentalities or fruits of crime they would have been retained. It is quite obvious that the items as contained in Exhibit 3 fall within the range, as set forth in the **Abel** case, of private papers which the prosecution intended merely to use as evidence.

This Court has laid down the doctrine in **Mapp v. Ohio**, 367 U. S. 643, that the Federal rule rendering illegally obtained evidence inadmissible is applicable to the States under the due process clause of the Fourteenth Amendment to the Constitution. Certainly the procedure in the instant case followed by the State of Missouri constituted a violation of the due process clause and is in direct conflict with the provisions of the **Mapp** case. It is earnestly contended that this Court should issue its Writ since the action of the State is in conflict with this Court's ruling in **Mapp** and **Ker v. California**, 374 U. S. 23.

It is to be noted that the instant case has been reversed and remanded for a new trial by the Supreme Court of the State of Missouri on grounds other than those contained in this petition for Writ of Certiorari. However, both the trial court and Supreme Court of Missouri have ruled that the evidence complained of herein is legal and admissible and that the petitioner must therefore under the ruling of the State Courts face a new trial with the same evidence which it has contended was illegally obtained. Since the courts of Missouri have ruled specifically on the question of the legality of and admissibility of this evidence, it is contended that this Court now has the right to pass upon this question and render its decision accordingly.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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OPINION AND JUDGMENT OF THE SUPREME COURT OF MISSOURI.

In the Supreme Court of Missouri,
Division Number Two.

State of Missouri,
Respondent,
v.
Charles Berstein, a/k/a Chuck Berns,
Appellant.
No. 49,376.

Appeal From the Circuit Court of the City of St. Louis,
Honorable Ivan Lee Holt, Jr., Judge.

Defendant was found guilty on a charge by indictment of the grand jury of buying and receiving stolen property in the amount of value over $50.00, and his punishment was assessed by the jury at four years in the Department of Corrections. After his motion for new trial was overruled and allocution was granted, sentence on the verdict was pronounced by the trial court, and defendant duly appealed from his judgment of conviction.

The facts leading up to defendant's trial and conviction are these: On March 15, 1961, the home of Mr. and Mrs. Fred Langbein, 3876 Federer, St. Louis, Missouri, was burglarized sometime in the afternoon, and some $1,500.00 of their property therein was stolen, among which property were two oil paintings. The Langbeins reported the incident to the police immediately, gave them a list of the stolen property, and the officers came to their home to make investigation on the same day.

On March 29, 1961, Officer Harold Schriefer and Sergeant Klein went to the premises of defendant at Union and Palm Streets in the City of St. Louis, this being the

next day after Klein had received an anonymous telephone call. As they were turning their car onto Union Street, they saw one Joseph Gilberti and defendant talking on the sidewalk just adjacent to defendant's used car lot. Defendant then walked away and Gilberti got into his car and drove north on Union Street to San Francisco Street where he turned east. The officers followed Gilberti for some time, there being some truck traffic between the two automobiles, and finally came up to him about the 4800 block on Natural Bridge. The officers then stopped Gilberti, placed him under arrest and asked him to open the trunk of his car, which he did, and the two oil paintings, State's Exhibits 1 and 2, identified as the property of the Langbeins, were found therein.

The following day, March 30, 1961, at about 11:50 a. m., at Natural Bridge and Union, at Frances Auto Sales, Sergeant Klein assisted in defendant's arrest, for which there was no warrant, following which defendant was taken to Police Headquarters, booked and was placed in holdover.

Upon being booked, defendant's billfold was taken from him by the officers, placed in a property envelope, and later certain papers, including the original of State's Exhibit 3 (the card list testified to by the State's principal witness, Barnes, as having been written upon by defendant in recording the amounts paid Barnes by defendant for stolen property), were photocopied by the police. Thereafter, upon defendant's release, the originals of these papers, including the original of State's Exhibit 3, were returned to him.

No issue is made here as to the submissibility of the State's case, but defendant complains of rulings of the trial court made during trial and in pretrial conferences. Those issues which are necessary to a determination of this appeal are set out below.

Defendant first says that the trial court erred in overruling his pretrial motion to suppress evidence, State's Exhibit 3, the original of which was taken by the officers from the defendant and photocopied after his arrest nd at the time of his being booked and placed in holdover, on the ground that the arrest was unlawful and without probable cause to justify same.

It has long been the rule in this state, and many cases set it forth, that a peace officer may arrest without a warrant anyone who he has reasonable grounds to believe has committed a felony. State v. Williams and Wann, 328 Mo. 627, 14 S. W. 2d 434; State v. Whitley, Mo., 183 S. W. 317, 320 [4]; State v. Evans, 161 Mo. 95, 110, 61 S. W. 590; State v. Cushenberry, 157 Mo. 168, 56 S. W. 737, 742; State v. Grant, 79 Mo. 113. The officer may arrest any person upon suspicion who is in fact guilty of a recent felony, whether the officer be advised of such felony or not. State v. Whitley, supra; State v. Cantrell, Mo., 310 S. W. 2d 866; State v. Edwards, Mo., 317 S. W. 2d 441; State v. Brown, Mo., 291 S. W. 2d 615, 618 [2-4]; State v. Brookshire, Mo., 353 S. W. 2d 681, 684 [7-9].

As to what constitutes reasonable grounds or probable cause for the officer to arrest without a warrant, it was said in State v. Cantrell, supra, loc. cit. 869 [6], "What constitutes 'a reasonable and probable ground of suspicion' is incapable of exact definition, beyond saying that the officer must not act arbitrarily, but must exercise his discretion in a legal manner, using all reasonable means to prevent mistakes. In other words, he must be actuated by such motives as would influence a reasonable man acting in good faith."

Being guided by the cited rule, it is clear in the instant case that the officers did not act arbitrarily. Here, the evidence is that the officers had actual, prior knowledge that a burglary and theft had been committed at the Lang-

bein home and they had a list of the stolen property. It was common knowledge at the Police Headquarters that defendant was suspected of receiving stolen property; the officers had received an anonymous telephone call that caused them to proceed to defendant's premises (although it does not appear from this record as to what was discussed, objections being sustained as to this subject); upon arrival at defendant's premises, they saw him talking to Gilberti in whose possession the Langbeins' stolen paintings were found upon Gilberti's arrest. In addition, under the evidence presented, the jury found defendant guilty of the felony as charged. We cannot say that the officers acted unreasonably in arresting defendant or without probable cause. Under the circumstances, his arrest was legal, and State's Exhibit 3 was not rendered inadmissible by such arrest.

Of course, it follows that having lawfully arrested defendant upon suspicion that he was implicated in the felony that had been committed, the officers had a right to search his person and to take into their possession any incriminating evidence, including State's Exhibit 3. State v. Raines, 339 Mo. 884, 98 S. W. 2d 580, 584 [6, 7]; State v. Martin, 357 Mo. 368, 208 S. W. 2d 203; State v. Hands, Mo., 260 S. W. 2d 14.

On October 4, 1961, five days before the trial, defendant filed his "Motion to Strike Witness," moving the court to strike from the indictment the name of Robert Earl Barnes and for further order that the plaintiff not be permitted to use said Robert Earl Barnes as a witness for the reason that defendant "has, at the request, order and instruction of the plaintiff been denied the right and opportunity to interview and interrogate said Robert Earl Barnes, and that as a result thereof, defendant has been denied his right and opportunity to properly and adequately prepare his defense * * *."

On the hearing on the motion on October 5, 1961, the following proceedings were had:

"Mr. London: May it be stipulated that in the indictment in this cause one Robert Earl Barnes has been endorsed by the State as a witness. That last evening I went to the Second District Station where Robert Earl Barnes is incarcerated and requested the opportunity to speak with him to interview him, stating that I was not his attorney but that I was the attorney for the defendant in this case and that he had been endorsed as a witness. I was denied the right or privilege of interviewing or talking to him. I have discussed this matter with Mr. Reardon, and it is my understanding that Mr. Reardon has instructed the police that he is not to be interviewed, that I may take his deposition, if that is my desire, but as far as investigating the case, or interviewing Mr. Barnes, or talking to Mr. Barnes, that I am not to be allowed to do so.

"Mr. Bantle: That is right.

"Mr. London: Will the State stipulate to those facts?

"Mr. Bantle: It is my understanding. I want to add the additional fact, if it was Mr. London's desire to privately interview him, of course he has not been made available for that purpose.

"The Court: And I assume from what you said Mr. London is not going to take his deposition?

"Mr. London: No, sir, I don't feel I want to take his deposition for the purpose of possibly making him my witness.

"The Court: I am not saying to make him your witness by taking his deposition.

"Mr. London: I would be in a sense perpetuating his testimony in the event that the State was unable to put him on for any reason, if for some reason this man should be called by St. Louis County or any other jurisdiction and he would be unavailable.

"Would I be allowed to interview him if it were not in private. I don't say it has to be a private interview. I just say I wanted to interview him and discuss certain matters with him relative to his function in this case as a witness.

"The Court: I don't think that is a matter that we are going to answer as a court. You can take that up with Mr. Reardon. I find no basis from my knowledge of the law for the motion, and I overrule the motion to strike the witness."

It is to be noted from the record that Barnes was the principal witness by whom the state made its submissible case against defendant. Barnes, an accomplice, in turning state's evidence, testified directly concerning the sale of the two oil paintings (and other property stolen at the same time), and he also testified concerning other dealings in stolen property with the defendant. Barnes himself was charged with nine separate offenses in the City of St. Louis and in St. Louis County, and he admitted on the witness stand that he had committed in the past some 200 burglaries.

No Missouri case has been cited to this court by either party, and we have found none, directly deciding the right of a defendant in a criminal case, by his counsel, to interview prospective material witnesses for the State who are incarcerated at the time the interview is requested. The better view, in cases from other jurisdictions, under the circumstances which are here present, is that defendant has such a right, and to deny the same to him is an abuse of discretion amounting to error. See Annotation, 124 A. L. R. 454.

The reasons for the rule in those states which accord to defendant the right to interview a material witness in jail are similarly stated. In State v. Papa, R. I. Sup., 80 A.

12, 15, the court said, "The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview and examine as many as possible of the eyewitnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties, and should not be partisans. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous."

In the case of Exleton v. State, 30 Okla. Crim. Rep. 224, 235 P. 627, at the beginning of the trial, counsel for defendant, in open court, stated that the name of witness Waters had appeared on the information, and was on the list of witnesses furnished by the state, and stated to the court that the witness was confined in the jail of Garwin County. A request to the sheriff to interview or confer with the witness was denied. The trial court, upon defendant's repeated requests to interview the witness, denied same, and in reversing the case the appellate court said: "Where a material witness, and particularly as in this case, an accomplice, is incarcerated in jail and to that extent under the control of the prosecution, and the defendant makes application for leave to interview or question such witness in reference to his testimony, under all the facts shown here, the court should afford a reasonable opportunity for such purpose, and the denial of the request of the defendant was error." See also, Bobo v. Commonwealth, 187 Va. 774, 48 S. E. 2d 213; Gallman v. State, Ala. Sup., 195 So. 768; People v. Earle, 183 N. Y. S. 2d 586; Wilson v. State, 93 Ga. App. 229, 91 S. E. 2d 201, 202

The State contends here that the defendant did not make proper application to the court to interview witness Barnes. It is true that the matter was first brought to the court's attention by the "Motion to Strike" the name of the witness from the indictment. While defendant could have more specifically brought the matter before the court by a motion to interview witness, or by application for a writ of habeas corpus ad testificandum, we think the defendant, in the hearing on the motion in addition to what was stated in the motion to strike, sufficiently presented his request to the trial court.

In order to avoid coercion or intimidation of the witness for the prosecution, and so as not to hamper the defendant's counsel, the interview with the witness should be conducted out of the presence of the prosecutor and with as much privacy as is consistent with reasonable security measures of the prison, Gallman v. State, supra; Bobo v. Commonwealth, supra.

Since this case must be retried for error in not granting to defendant the right to interview witness Barnes, other claimed errors, although there may be merit in some of them, are not likely to recur upon new trial.

The judgment of the trial court is reversed and this case is remanded for new trial.

Jack P. Pritchard,
Commissioner.

Barrett, C., Concurs.

Stockard, C., Concurs.

Per Curiam: The foregoing opinion by Pritchard, C., is adopted as the opinion of the Court. All of the Judges Concur.